Supreme Court, U.S.
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No. 98-1306

In The

Supreme Court of the United States

October Term, 1998

MENOMINEE INDIAN TRIBE OF WISCONSIN,

Petitioner,

v.

TOMMY G. THOMPSON, Governor of the State of Wisconsin; GEORGE E. MEYER, Secretary, Wisconsin Department of Natural Resources; JAMES T. ADDIS, Administrator, DNR Division of Resource Management; JOHN E. FRYATT, Administrator, DNR Division of Enforcement; HERBERT F. BEHNKE, TRYGBE A. SOLBERG, NEAL W. SCHNEIDER, BETTY JO NELSEN, MARY JANE NELSON, JAMES E. TIEFENTHALER, JR., and STEPHEN D. WILLETT, Members, Wisconsin Natural Resources Board,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Does the alleged "Indian understanding" override plain treaty language?

2. In an 1831 treaty with the United States, the Menominee Indian Tribe retained title to lands west of the Fox River and reserved the area "for a hunting ground, until the President of the United States, shall deem it expedient to extinguish their title" to these lands. The tribe also "promise[d] to surrender it immediately" when notified of the government's desire to possess it. Were the tribe's special hunting rights thereafter extinguished as a matter of law when the tribe conveyed title to these lands to the United States through subsequent treaties?

3. In the alternative, were the tribe's special hunting rights on these lands extinguished as a matter of law (a) when the tribe entered into subsequent treaties requiring their removal from the lands and their relocation to Minnesota, or (b) when Wisconsin attained statehood in 1848?

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Respondents respectfully submit this brief in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE

Petitioner commenced this action in January 1995 to enjoin state of Wisconsin officials (hereafter "state") from interfering with claimed aboriginal and treaty-based usufructuary rights. R.2. The complaint advanced six different claims, but the tribe here abandons all but one -- the claimed hunting right west of the Fox River in Wisconsin under the 1831 treaty.[1]

There were four treaties between the tribe and the government in 1831, 1836,[2] 1848,[3] and 1854.[4] Only the 1831 treaty reserved usufructuary rights. It distinguished between lands east of the Fox River and lands west of the Fox River. On the east, title was conveyed to the United States but the right to hunt and fish was preserved until the lands were "surveyed and offered for sale by the President; they conducting themselves peaceably and orderly." App. 170. As the tribe conceded, these lands were surveyed and offered for sale by 1834. App. 4, 20-21, 151. On the west, the hunting right was to remain "until the President of the United States, shall deem it expedient to extinguish their title." App. 171. When notified of the government's "desire ... to possess it," the "tribe promise[d] to surrender it[5]

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[1]February 8, 1831, 7 Stat. 342; supplemented February 27, 1831, 7 Stat. 346; amended October 27, 1832, 7 Stat. 405.

[2]September 3, 1836, 7 Stat. 506.

[3]October 18, 1848, 9 Stat. 952.

[4]May 12, 1854, 10 Stat. 1064.

[5]The tribe's appendix inadvertently omits the word "it".

immediately." Id. In 1836 the tribe ceded lands immediately west of the Fox, and in 1848 it ceded all remaining Wisconsin lands "wherever situated."[6]

In addition to ceding lands, in the 1836 treaty the Menominee agreed to remove from the portion ceded.[7] Likewise in the 1848 treaty, having ceded all Wisconsin lands, the Menominee agreed to remove to the Minnesota reservation conveyed to it by that treaty.[8] But they were permitted "to remain on the lands hereby ceded for and during the period of two years ... and until the President shall notify them that the same are wanted." Article VIII; App. 203.

The Menominee complaint did not mention the 1848 treaty. When the state officials cited its terms of cession and obligatory removal, the Menominee argued that treaty was the product of fraud[9] and that it had been nullified by the 1854 treaty. App. 60-61. The courts below, however, read all four treaties together. The district court said, "Each treaty built upon its predecessor by continuing forward the obligations undertaken in the previous agreements." App. 65.

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[6]Under the 1836 treaty, Article First, the Menominee "cede[d] to the United States, all of that tract or district of country" west of the Fox River described in that article. App. 190. Under the 1848 treaty, Article II, the Menominee "agree to cede, and do hereby cede, sell, and relinquish to the United States all their lands in the State of Wisconsin wherever situated." App. 199..

[7]The 1836 treaty, Article Fourth, provided that "the said Menomonie nation do agree to remove from the country ceded, within one year after the ratification of this treaty." App. 193.

[8]Article IV gave the Menominee benefits "preparatory to their removal to the country set apart for and given to them" and "in consideration of their removing themselves, which they agree to do." App. 200. The new reservation was some 300 miles away. App. 18. See the district court's extensive discussion, App. 127-30, 155-56.

[9]There is no basis for the tribe's puzzlement here as to why the courts below thought it argued the 1848 treaty was a product of fraud. See its district court brief, R.25, at 17, 19, 41, 42, 44. Also see its Seventh Circuit brief at 32; but see 30 n.17 (asserting its references to fraud were not intended to argue for invalidation of the 1848 treaty).

The court of appeals noted that "courts must construe successive treaties in conjunction with the language of earlier treaties." App. 16 (citations omitted).

The 1854 treaty itself explains what happened after the 1848 treaty. The Menominee did not want to go to Minnesota. See Preamble ("upon manifestation of great unwillingness ... to remove ... and a desire to remain in the State of Wisconsin"). App. 206. So, "the President consented to their locating temporarily upon the Wolf and Oconto Rivers," id., and the 1854 treaty was to be "supplementary and amendatory" to the 1848 treaty. Preamble, App. 205. The Menominee retroceded the Minnesota reservation to the government. Article 1, App. 207. The government gave the Menominee a Wisconsin reservation lying on the Wolf River as well as other enhanced benefits. App. 207-08, esp. Article II.

The state moved to dismiss for failure to state a claim because the treaties on their face showed that the temporary usufructuary rights were title-dependent and that the tribe had given up title. At first the district court dismissed only one of the six claims, but admitted it was a "close question" whether the plain treaty language could support the tribe's use right claims. App. 47. The tribe "has not explained how it can show that the apparently clear language of the treaties into which it entered did not operate to terminate all of its rights, title and interest to its lands in the state of Wisconsin, including its usufructuary rights." App. 95. But the court decided to give the tribe another chance: it called for "contention interrogatories ... to learn the factual basis for its claims." Id. at 54. The court noted that the tribe was "noticeably reticent" to explain the basis of its claim, id. at 49, and during a later hearing expressed its frustration over the continued failure to explain.

> THE COURT: ... This case was filed ... [f]ifteen months ago. You must know what

> the basis for your filing is. ... [Y]ou have kept it a secret, and I think it's time to let it out.

Tr. 3/22/96 at 72.

> THE COURT: I did not criticize you for not bringing forth documents. I criticized you for not letting me know why you believed that these treaties could be interpreted to say something other than what they seem to say on their face.
>
> ...
>
> THE COURT: Anyone can walk into court and say we think that this treaty that says day is day and night is night should be interpreted to say day is night and night is day. That takes no effort whatsoever. But it's also a violation of the Rule 11.

Id. at tr. 73.

On receipt of the tribe's answers to contention interrogatories, the state renewed its motion to dismiss, relying only on the treaty language and historical materials from the tribe's answers to the contention interrogatories. R. 78, 79. While decision was pending, petitioner at no time sought leave to supplement its June 26, 1996, brief (R. 91) to explain how the experts' reports filed on September 3, 1996 (R. 99-104), might affect the pending decision. It did not flag them to the district court until after dismissal in its motion under Fed. R. Civ. P. 59(e). R. 108, 110-19. Nevertheless, on rehearing the court emphasized that it had "made a careful review of plaintiff's motion, supporting briefs and expert reports in an effort to ensure that none of plaintiff's arguments has been overlooked or construed incorrectly." App. 149.

In its dismissal decision, the district court treated the motion to dismiss as one for judgment on the pleadings and accorded the tribe's entire submissions, including its answers to contention interrogatories and its judicially noticeable historical materials, as supplemental allegations enjoying the same liberal indulgences as on a motion to dismiss. App. 100-02. The court of appeals did so as well. App. 12-14.

REASONS WHY THIS COURT SHOULD NOT GRANT THE PETITION

A. Summary

There are four reasons why this Court should not grant the petition for a writ of certiorari: (1) the case simply involves the application of unambiguous treaty language; (2) petitioner would undermine this Court's precedents that unambiguous language is controlling; (3) petitioner's contention, that the holdings below are contrary to two prior decisions of this Court, is being raised now for the first time and lacks merit; and (4) as an independent ground for affirmance, the Equal Footing doctrine extinguished these temporary rights when Wisconsin attained statehood in 1848.

This case presents nothing novel. The tribe merely refuses to accept plain and unambiguous treaty language. The tribe agreed in 1831 that its use rights west of the Fox River in Wisconsin would remain "until the President of the United States, shall deem it expedient to extinguish their title." App. 171. When notified of the government's "desire … to posses it," the "tribe promise[d] to surrender it immediately." Id. Thus, the treaty language itself made the rights title-dependent.

Critically, the tribe never doubts it lost title. Nor could it: the tribe ceded ownership of part of its remaining lands in 1836 and all of the rest in 1848. Rather, the tribe

simply does not want to follow the plain, unambiguous treaty language. As noted, the district court admonished tribal counsel of the Rule 11 consequences of arguing "that this treaty that says day is day and night is night should be interpreted to say day is night and night is day." This brief at 4.

Petitioner would undermine this Court's precedents that unambiguous language is controlling. It baldly told the district court that "treaty language is almost irrelevant" and that treaties "cannot speak for themselves,"[10] a position it reiterated in the court of appeals. Principal br. at 5 and reply brief at 9 (there need be "no threshold finding of ambiguity" to skip from the language to alleged Indian understanding).

By insisting that the tribe's subjective view is controlling regardless of the clarity of the language, the tribe would have this Court undermine the solemnity of treaties. No longer could Congress, the President, or anyone else rely on plain, ordinary words. What the Indians allegedly thought the words meant would be dispositive, even in the face of plain treaty language. This Court never has so held. Indeed, it has clearly and repeatedly held otherwise.

The tribe for the first time argues that the holdings below are contrary to Wisconsin v. Lane, 245 U.S. 427 (1918), and Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968). The tribe cited these cases below for different purposes than now advanced here.

Moreover, the contention wholly lacks merit. As to Lane, the tribe distorts this Court's language as meaning that the 1848 treaty gave them an indefinite right of occupancy on Wisconsin lands. In fact, Lane confirms the lower court holdings in this case that the Menominee remained in Wisconsin beyond the time allowed in the 1848 treaty as a matter of grace and discretion of the government. As to

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[10]R.25 at 37; R.109 at 16. *See also* R. 25 at 22-23, 31; R.109 at 41, 52.

Menominee Tribe of Indians v. United States, this Court held that the 1854 treaty, which created a reservation out of a small portion of the lands previously ceded (compare maps, App. 214 and App. 220), superseded Wisconsin's regulatory power by force of the Supremacy Clause, *but only as to the reservation lands.* 391 U.S. at 411 n.12. In fact, this Court acknowledged that the tribe had surrendered its off-reservation usufructuary rights in order to get on-reservation usufructuary rights. 391 U.S. at 406 n.2. In short, the tribe would have this Court reverse its holding that there no longer were off-reservation use rights.

In addition, under the Equal Footing doctrine these temporary rights established under the 1831 treaty were extinguished when Wisconsin attained statehood in 1848. Only permanent treaty-based rights survive statehood. The terms of the 1831 treaty manifestly bespeak temporary rights: the special rights would continue "until" title was extinguished and, once notified of the government's "desire ... to posses it," the "tribe promise to surrender it immediately." App. 171.

This is an entirely different case than Mille Lacs Band of Chippewa Indians v. Minn., 124 F.3d 904 (8th Cir. 1997), cert. granted, 118 S.Ct. 2295 (1998). The rights here were wholly title-dependent. The treaties here ceded title to the same lands with the title-dependent use rights, not to a separate parcel as in Mille Lacs. Last, Mille Lacs involves a challenge to the validity of an Executive order requiring the Indians to remove without first obtaining their consent. Here, the duty to remove was validated by Congress when it ratified the treaties which the tribe had signed and agreed to.

B. This case presents nothing novel.

1. The treaty unambiguously makes the hunting right title-dependent.

A case needs to present something exceptional to warrant this Court's discretionary review. A petition will be granted "only for compelling reasons." This Court's Rule 10.

There is nothing compelling here. The right to hunt was dependent on title to land. The tribe lost its title to land. Therefore, it lost its right to hunt. This case is that simple.

Title dependency is obvious on the face of the treaties. The 1831 treaty distinguished between lands east of the Fox River in Wisconsin and lands west of it. Regarding the lands east of the Fox, the tribe "cede[d] and forever relinquish[ed]" them to the United States. App. 166. Speaking to reserved use rights,

> The Menomonee ... shall be at liberty to hunt and fish on the lands they have now ceded to the United States, on the east side of Fox River and Green bay, with the same privileges they at present enjoy, until it be surveyed and offered for sale by the President; they conducting themselves peaceably and orderly.

App. 170 (emphasis added).

Turning to the west of the Fox, the treaty provided that the lands

> adjoining the farming country on the west side of the Fox river, will remain to them as heretofore, for a hunting ground, until the President of the United States, shall deem it expedient to extinguish their title. In that case, the Menomonee tribe promise to surrender it immediately, upon being notified of the desire of Government to possess it.

App. 171 (emphasis added).

Until this petition, the tribe has argued that its usufructuary rights under the 1831 treaty still existed *both* east and west of the Fox. In regard to the claim east of the Fox, the district court[11] and the court of appeals[12] each identified its many flaws. The tribe wisely abandons it here.

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[11]As the district court aptly said:

> The natural reading of that clause is that the Menominee could continue to hunt and fish on the ceded lands until the President sold the land but that their right to do so would expire before then if they did not behave in a peaceable fashion.

App. 117. Further, "there was no ambiguity about the fact that it [the liberty to hunt and fish] would end at some point, regardless how well the Menominee conducted themselves." App. 152. Indeed, the Menominee agreed the land was surveyed and offered for sale by 1834 or 1835. App. 4, 20-21, 151. The district court also identified other circular and contradictory reasoning in petitioner's argument. See App. 115, 152-53.

[12]After noting the land was surveyed and offered for sale in 1834, the court said:

> Therefore, according to the terms of the treaty, the usufructuary rights on the east side of the Fox were extinguished long before the Tribe and the United States entered into the 1848 Treaty. Because the right to hunt and fish on these lands was extinguished in 1834 through satisfaction of the conditional term (namely, the land was surveyed and offered for sale), it

Nevertheless, the tribe presses its claim west of the Fox. But it is equally without merit. The "hunting ground" would remain "until [the President] shall deem it expedient to extinguish their title," and the tribe "promise[d] to surrender it immediately, upon being notified of the desire of Government to possess it." App. 171.

Quite simply, once title was gone and once the government wanted it, the hunting ground was to be surrendered immediately. As the court of appeals stated, "[T]he 1831 Treaty explicitly links the right to hunt on the land to having title to the land." App. 22. It necessarily follows, as the district court held, "With the loss of title, the tribe lost the use rights that were dependent on title." App. 154.

The tribe lost title by ceding these lands west of the Fox River in its 1836 and 1848 treaties Therefore, it lost the hunting right.

> was unnecessary to explicitly abrogate the right to use lands east of the Fox in the 1848 Treaty, and even less reason to mention that right in the 1854 Treaty.

App. 20-21. As to the tribe's argument that the use rights would last so long as they behaved "peaceably and orderly," the court said:

> [T]he 1831 Treaty simply does not support such an interpretation: it does not distinguish between land actually sold and land offered for sale. Moreover, the government's express purpose for entering into the 1831 Treaty was to encourage the Menominee to become farmers and to use the land east of the Fox River for settlers. Allowing the Tribe to hunt on the lands that were not actually sold certainly would not have served the government's goals of discouraging the Tribe's pursuit of hunting and gathering food and encouraging settlement. Given this historical context, we will not ignore the plain meaning of the 1831 Treaty.

App. 21.

2. Having lost title, no other event was necessary to extinguish the usufructuary right.

Petitioner relies heavily on the fact the later treaties ceding all Wisconsin ownership interests do not also explicitly say that they swept in the temporary 1831 hunting rights west of the Fox. The short answer is that such a subsequent explicit abrogation was unnecessary because the 1831 treaty itself set forth the extinguishing condition, namely, loss of title. As the court of appeals said,

> The 1831 Treaty explicitly links the right to hunt on the land to having title to the land: the Treaty states that the Tribe's right to hunt on the land remained until the President extinguished their title to the land. The Treaties of 1836 and 1848, in which the Menominee ceded title to those lands, thus extinguished their right to use the land for hunting. Again, it was unnecessary to mention the usufructuary rights in the 1854 Treaty.

App. 22-23. The district court also put it nicely.

> It would be unnecessary for the government to provide expressly for the extinguishment of rights that were to expire of their own accord. The rights would be extinguished by the occurrence of the terminating events, as provided.

App. 56-57.

It is critical to observe that petitioner does not doubt that it lost title to the land.[13] The tribe, therefore, concedes that the extinguishing event occurred.

The tribe argues that the decisions below conflict with this Court's recognition in Oregon Department of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 765-766 (1985), that "Indians may enjoy special hunting and fishing rights that are independent of any ownership of land." Pet. 13. But Klamath undermines rather than supports the tribe's claim in this case. As this Court emphasized in Klamath, tribal use rights survive the cession of underlying title *only* if a treaty "created hunting and fishing rights that were *separate from and not appurtenant to*" ownership of the lands themselves; otherwise, "silence concerning specific rights ... is consistent only with an intent to end any special rights of the Tribe," and a conveyance of underlying title "*unquestionably* would encompass any special right to use the ceded lands for hunting and fishing" that "the Indians had previously possessed." Id. at 766, 768, 773 & n. 23 (emphasis added). In this case, not only were the tribe's hunting rights not "separated" from underlying title, the 1831 treaty expressly provided that they would last only *until* title itself was extinguished. When title was subsequently extinguished through the 1836 and 1848 treaties, this "unquestionably" extinguished the Menominee's "appurtenant" use rights as well. Id. at 766, 768.

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[13]It could not possibly make such an argument given the clarity of the treaty language of 1836 and 1848. Under the 1836 treaty, Article First, the Menominee "cede[d] to the United States, all of that tract or district of country" west of the Fox River described in that article. App. 190. Under the 1848 treaty, Article II, the Menominee "agree to cede, and do hereby cede, sell, and relinquish to the United States all their lands in the State of Wisconsin wherever situated." App. 199.

3. Alternatively, the 1836 and 1848 treaties independently extinguished the 1831 temporary use rights.

The 1836 and 1848 treaties did not merely cede title and all interests in the land. They also required the tribe to leave Wisconsin.[14] Thus, in addition to being the self-extinguishing events under the 1831 treaty, these treaties extinguished all interests even if the usufructuary rights had been indefinitely reserved in 1831. Until this suit, the tribe always admitted it had given up these interests. See its 1951 petition to the Indian Claims Commission that, by these treaties, it "relinquished and ceded ... all its right, title and interest ***in and to***" the affected tracts. App. 41. (emphasis added).

The duty to leave Wisconsin for Minnesota is wholly incompatible with retaining hunting rights in Wisconsin. As the district court said:

> [P]laintiff repeats its previous argument that because the 1848 treaty did not make explicit reference to abrogation of the use rights and the tribe never abandoned those rights or relinquished them voluntarily under the treaty, the rights remain in the tribe. This argument is logically inconsistent with the concept of

[14]Under the 1836 treaty, Article Fourth, "the said Menomonie nation do agree to remove from the country ceded, within one year after the ratification of this treaty." App. 193. Likewise, under Article II of the 1848 treaty the tribe ceded "all [Menominee] lands in the State of Wisconsin wherever situated," App. 199; under Article IV they received benefits "in consideration of their removing themselves, which they agree to do," App. 200; and under Article VIII they were allowed "to remain on the lands hereby ceded for and during the period of two years ... and until the President shall notify them that the same are wanted." App. 203. See the district court's extensive discussion, App. 127-30, 155-56.

> obligatory removal from the area in which the rights allegedly existed and it depends entirely on the flawed premise that the tribe's use rights were permanent in nature.

App. 156. The court of appeals said, "[T]he Menominee could not reasonably have expected to continue hunting and fishing on the land ceded in 1848, considering the Tribe had just agreed to leave the Wisconsin land and move to the Minnesota reservation approximately 300 miles away." App. 18.

It makes no difference that the Menominee did not in fact leave Wisconsin for Minnesota. By the 1854 treaty the tribe exchanged its 1848-granted Minnesota home for a Wisconsin reservation. The controlling decision is New York Indians v. United States, 170 U.S. 1 (1898). "[T]hat their failure to remove should result in a cancellation of the treaty, and a restoration to them of their rights in the Wisconsin, lands ... is precluded by the language ... which contains a present and irrevocable grant of the Wisconsin lands, and puts it beyond their power to revoke the bargain." Id. at 19. Therefore, as the court of appeals said, "The 1848 Treaty ... contained a present and irrevocable grant of the Wisconsin lands; the Tribe's refusal to move to Minnesota does not affect that grant in any way." App. 19. Or, as the district court put it:

> By ceding the Minnesota lands [in 1854], the Menominee acknowledged that the 1848 treaty had taken effect even though they had not removed to Minnesota. Otherwise, the Menominee would not have had the lands in Minnesota to exchange for those on its new reservation.

App. 129. " [B]y maintaining that it did cede its land, plaintiff recognizes that the 1848 treaty was not contingent

upon the exploratory trip or the removal. The plain language of the treaty supports this conclusion." Id. at 127. Further,

> The treaty took effect when it was signed, as shown by the fact that when the United States agreed not to force the Menominee to go west to lands they disdained, an entirely new treaty was negotiated, and made supplementary and amendatory to the 1848 treaty. Plaintiff does not contend that it did not obtain an interest in the lands in Minnesota when it signed the treaty. Obviously, those lands were the consideration for the grant of the Wolf River Reservation to plaintiff in 1854.

Id. at 155-56.

Here, the Menominee argue that the 1848 treaty right to remain for two years gave them a right to remain indefinitely. Apart from the tortured construction of the treaty language, however,[15] the Menominee conduct belies any such understanding. The tribe asked permission to remain longer and the President granted the request as an act of favor, not right.[16] This Court has noted this indisputable historical fact.

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[15]Article VIII provided:

> It is agreed that the said Indians shall be permitted, if they desire to do so, to remain on the lands hereby ceded for and during the period of two years from the date hereof, and until the President shall notify them that the same are wanted.

App. 203.

[16]The 1851 report of the Commissioner of Indian Affairs stated the following:

> The fall of last year was the period fixed upon for their removal; but owing to their urgent appeals, and those of many of the whites in their immediate vicinity, and in consideration of their peaceful habits, the President granted them permission to remain until the 1st of June,

See Beecher v. Wetherby, 95 U.S. 517, 526-27 (1877) ("the President permitted their **temporary** occupation") (emphasis added.) Also see Wisconsin v. Lane, 245 U.S. 427, 429-30 (1918) ("the President gave the Indians permission to remain upon the ceded lands until June 1, 1851; this time was subsequently extended by the President to October 1, 1852").

Petitioning to stay is the opposite of asserting a right to stay. The court of appeals rhetorically asked: "if in 1850 the Tribe did not believe that the 1848 Treaty was binding, why did the Tribe seek the president's permission to remain on land in Wisconsin; if the Treaty was non-binding such permission would obviously have been unnecessary." App. 18.

All this undisputed historical evidence rejects the present-day Menominee claim of having thought they had a treaty right to occupy Wisconsin land indefinitely. Indeed, the 1854 treaty preamble itself stated that the tribe remained in Wisconsin beyond the two years because "the President [had] consented to their locating ***temporarily*** upon the Wolf and Oconto Rivers." App. 206 (emphasis added). Summarizing, the district court correctly said:

> of the present year. At the expiration of this last named period, it being known that they had made no arrangements, and were in no condition to emigrate, the President again, at their earnest solicitation, consented that they might remain a twelvemonth longer, on condition, however, that they should not interfere with the public surveys, and with the distinct understanding that this extension of time was to be considered an act of favor, they being still subject to removal at his discretion; and of this Superintendent Murray was instructed to take care that they should be fully advised.

(AROCIA 1851) (Ct. App. appendix 139(5)). The district court recited other indisputable public records showing the Menominee understood they remained by sufferance and favor, not by a reserved use right or a right to revoke a treaty. App. 128-29; R. 15; R.71 (tab 11 at 52).

> Plaintiff has identified no material ambiguity that would suggest it could prevail upon its claim. ... [P]laintiff has failed to allege any facts that would show that the 1848 treaty is anything other than an obligatory removal treaty that extinguished **at its signing** any remaining rights plaintiff may have possessed within or with respect to its former territory. The government's agreement to let plaintiff remain in Wisconsin for two years gave plaintiff nothing more than a conditional right to stay and to hunt, fish and gather while it remained. The agreement did not restore the usufructuary rights lost with the occurrence of the events specified in the 1831 treaty or with the signing of the 1848 treaty.

App. 159-60 (emphasis the court's). See also the district court's recitations of the tribe's many historical admissions and representations that it had given up all off-reservation rights. App. 132-33, 139-40.

4. The lower courts did not confuse use rights with title to land.

Petitioner also contends that the lower courts muddled the fact that use rights and title are severable and that the former does not necessarily require the latter.

The district court said it best. "That is not the issue. The issue is whether plaintiff gave up both rights in the 1831 treaty." App. 113. The district court similarly rejected petitioner's argument that the Menominee understood that their use right was not an interest in land but an immunity from state

regulation, citing their expert Professor Lund.[17] The district court said:

> Lund suggests that plaintiff's use rights reserved by the 1831 treaty were not interests in land but were instead a privilege and immunity from state regulation. Even if Lund's theory is correct, it does not change the fact that plaintiff's "privilege and immunity" expired with the occurrence of the extinguishing events explicitly set forth in the 1831 treaty.

App. 113-14[18]

C. Petitioner would undermine this Court's precedents that unambiguous language is controlling.

By ignoring the explicitly title-dependent nature of their 1831 use rights the tribe invites this court to hold that unilateral Indian understanding prevails over unambiguous

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[17]Note the district court's considerations of petitioner's experts' reports. Also see App. 157-59. Contrary to petitioner's suggestion here, the lower courts did not ignore what petitioner wanted to present through these experts. Rather, as the district court put it in denying petitioner's motion for reconsideration, it "made a careful review of plaintiff's motion, supporting briefs and expert reports in an effort to ensure that none of plaintiff's arguments has been overlooked or construed incorrectly." App. 149. The record also shows that, prior to its order dismissing the action, petitioner filed its expert reports but at no time asked to supplement its briefing to explain how they contributed to the tribe's claim.

[18]Besides, the law is pellucidly certain that usufructuary rights are interests in land. App. 135-37. Indeed, the tribe is judicially estopped from saying otherwise because it successfully argued before the Wisconsin Supreme Court that the use rights **were** interests in land, "exactly what plaintiff disavows in this case." App. 137-38.

treaty language. Its words to the district court were that "treaty language is almost irrelevant." This brief at 6.

This Court has never so held. Whereas the petitioner thinks all Indian treaty cases require extensive evidentiary data and findings, this Court has held that unambiguous language controls. Indian treaties

> are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." ... But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.

Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943) (citations omitted).[19]

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[19]See also South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 506 (1986)("The canon of construction regarding the resolution of ambiguities in favor of Indians ... does not permit reliance on ambiguities that do not exist ..."); Klamath, 473 U.S. at 774 ("courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' ... clearly runs counter to a tribe's later claims"); DeCoteau v. District County Court for the Tenth Judicial District, 420 U.S. 425, 447 (1975)("A canon of construction is not a license to disregard clear expressions of tribal and congressional intent"); Confederated Bands of Ute Indians v. United States, 330 U.S. 169, 179, 180 (1947)("we cannot, under the guise of interpretation, ... rewrite congressional acts so as to make them mean something they obviously were not intended to mean. ... We cannot, under any acceptable rule of interpretation, hold that the Indians owned the lands merely because they thought so"); Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 353 (1945)(a court must "stop short of varying [a treaty's] terms to meet alleged injustices"); United States v. Choctaw and Chickasaw Nation, 179 U.S. 494, 541 (1900)("it is not for the judiciary to defeat the will of the

This Court never should so hold. It would be unprincipled to do so. Treaties have features both of contracts and laws. See court of appeals citations, App. 15. If their words are to be meaningful they must have some controlling force. They are, after all, the "supreme law of the land." Menominee Tribe v. United States, 391 U.S. 404, 411 n.12 (1968) (internal quotes omitted).

And it would produce chaos to so hold. An opinion of subjective Indian understanding would last only until displaced by another opinion. As Judge Wood sagely noted here.

> It is no surprise that some Native Americans of this generation are dissatisfied with what their prior generations agreed to in order to resolve their problems of earlier times. Times change and people change, but treaties do not.

App. 29.

D. The claimed inconsistency with this Court's precedents is raised for the first time and is without merit.

This Court will not deal with an issue raised for the first time on certiorari, and it requires that an argument be well developed and presented below. See Youakim v. Miller, 425 U.S. 231, 234 (1976) (*per curiam*). Petitioner contends that the lower courts failed to follow this Court's holdings in Wisconsin v. Lane, 245 U.S. 427 (1918), and Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968). Respondents have lodged petitioner's briefs below with this Court. They show that petitioner has failed to meet this

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legislative branch of the Government by giving to an Indian treaty a meaning not justified by its words").

Court's standards for presenting issues well developed below.

As to Wisconsin v. Lane, this Court held that the action of Congress in 1852 authorizing the tribe to remain temporarily on what became reservation lands, together with the 1854 treaty's grant of a reservation, superseded Wisconsin's claim to section 16 school lands thereon. Petitioner now argues this Court also held that this meant the 1848 treaty failed to defeat the tribe's 1831 use rights. But petitioner came nowhere near this proposition below. The only remote resemblance was in the tribe's principal brief in the court of appeals when it said Lane "concluded that the Menominee had continuous lawful occupation in Wisconsin during those years" of 1848 to 1854. Page 36. This single sentence is all there was. There was no reference to section 16 lands on or off reservation. None of this Court's language was quoted. There was no analysis at all. There was nary a word that this Court held the 1848 treaty left the 1831 rights undisturbed. The case was simply cited for the entirely distinct point that the tribe's remaining beyond the two years was lawful, a point the state never disputed.

As to Menominee Tribe of Indians v. United States, the tribe here argues this Court held that the 1848 treaty gave Wisconsin no regulatory power anywhere in the state. No such contention was made below.

Moreover, neither decision supports the tribe's position in this case. Both decisions, in fact, reinforce the lower courts' conclusions.

Wisconsin v. Lane held that the 1852 congressional action and the 1854 treaty granting a reservation superseded the grant to Wisconsin of section 16 lands *on the reservation*. 245 U.S. at 433-34. That is not at all inconsistent with saying that the "President granted them permission to remain" beyond the two years in the 1848 treaty as "an act of favor,

they being still subject to removal at his discretion." This brief at 15-16 n.16. Nor is it inconsistent with this Court's further statement in Lane itself that, by the 1848 treaty, the Menominee Indians "gave up their holdings in Wisconsin." 245 U.S. at 432. Losing 1831 use rights by 1848 and lawfully remaining thereafter while a new reservation was established are not mutually exclusive. Indeed, that is exactly what happened.

As to Menominee Tribe of Indians v. United States, this Court clearly confined the limitation on the state's regulatory powers to the reservation lands created under the 1854 treaty. 391 U.S. at 411 n.12. In addition, rather than holding that the 1848 treaty was ineffectual to give Wisconsin off-reservation regulatory power, this Court held that the Menominee had traded in their off-reservation use rights for those on-reservation.

> "It would seem unlikely that **the Menominees** would have **knowingly relinquished their special fishing and hunting rights** which they enjoyed on their own lands, and have accepted in exchange other lands with respect to which such rights did not extend. They undoubtedly believed that these rights were guaranteed to them when these other lands were ceded to them 'to be held as Indians lands are held.' Construing this ambiguous provision of the 1854 treaty favorably to the Menominees, we determine that they enjoyed the same exclusive hunting rights free from the restrictions of the state's game laws over the ceded lands, which comprised the Menominee Indian Reservation, as they **had** enjoyed over the lands ceded to the United States by the 1848 treaty."

391 U.S. at 406 n.2 (emphasis added) (quoting from State v. Sanapaw, 21 Wis. 2d 377, 124 N.W.2d 41 (1963), cert. denied, 377 U.S. 991 (1964)).

This Court should note that the lower courts did not accept this argument. The court of appeals concluded this Court decided a different question, namely, the effect of the legislation terminating tribal status. App. 10-11. The district court agreed that on its appeal to this Court the tribe "seems to have adopted the position that, in fact, it had lost its off-reservation fishing and hunting rights in the nineteenth century." App. 140. But it believed this Court resolved that case "on other grounds." App. 79 and 87-88.

Both courts are mistaken. Not only did the tribe press this Court to agree it had given up its off-reservation use rights, this Court so decided. The issue here was not only the effect of termination legislation. The question also was whether the tribe had any on-reservation use rights after 1848 and prior to termination. As seen, this Court said yes and adopted the logic of the Wisconsin Supreme Court, at the tribe's urging, that it would have made no sense for the tribe to give up its off-reservation use rights without getting on-reservation use rights. The loss of off-reservation rights was a linchpin to this Court's analysis.

E. In any event, there is an independent ground for upholding the decision: statehood extinguished these temporary rights under the 1831 treaty.

Regardless of what this Court should decide about the canons of treaty construction as applied to these treaties, the decision below must be upheld because Wisconsin's admission to the Union in 1848 independently extinguished the Menominees' temporary, title-dependent and aboriginal rights

under Ward v. Race Horse, 163 U.S. 504 (1896). There, prior to statehood, a treaty granted a tribe the right to "hunt upon the unoccupied lands of the United States." Id. at 505. The Territory of Wyoming was established with a proviso that nothing would "'impair the rights of person or property now pertaining to the Indians.'" Id. at 506. But the law admitting Wyoming to the Union provided that it entered "'on an equal footing with the original States in all respects whatever.'" Id.

Ward concluded statehood extinguished hunting rights. It noted their "temporary and precarious" nature: they were "subject entirely to the will of the United States, since ... the right to hunt should cease the moment the United States parted with the title to its land in the hunting districts." Id. at 510. Second, Wyoming entered the Union on "equal footing" with the original states. The Act admitting Wyoming "expressly declared that that State should have all the powers of the other States of the Union, and made no reservation whatever in favor of the Indians." Id. at 511. Thus, the conflict between hunting rights and statehood was "irreconcilable" because "under no reasonable hypothesis can [they] be construed as coexisting". Id. at 514-15.

Race Horse applies here. The reserved treaty rights were not permanent and were subject to the will of the United States. The Act creating the Wisconsin Territory (5 Stat. 10) contained an express reservation of Indian rights. But both the Enabling Act of 1846 (9 Stat. 56) and the Act admitting Wisconsin to the Union in 1848 (9 Stat. 233) were silent on the subject. The latter, however, assured Wisconsin admission on an equal footing.

The district court did not accept this argument. "If, in fact, the rights granted plaintiff in the 1831 treaty are temporary in nature, as defendants contend, then the rights expired on their own terms and the equal footing doctrine has no relevance." App. 64. But the court missed the alternative nature of the argument. Even if the extinguishing events never

occurred, *i.e.*, even if title never were otherwise lost, statehood extinguished the temporary rights. The court of appeals did not discuss the issue.

F. Nothing in the Chippewa treaty litigation will affect the result of this case.

Petitioner, anticipating that this Court will affirm Mille Lacs Band of Chippewa Indians v. Minn., 124 F.3d 904 (8th Cir. 1997), cert. granted, 118 S.Ct. 2295 (1998), asks this Court to remand this case once it does so. It asserts there is a similarity in the language of the 1855 treaty[20] in Mille Lacs and the 1848 treaty here[21] but that the two circuits took opposite approaches to treaty interpretation.

The cases are quite dissimilar. The 1855 Mille Lacs treaty, despite very express cession language, was held not to extinguish usufructuary rights reserved under an 1837 treaty.[22] But the rights under the 1837 treaty were not title-dependent. They were expressly severed from title and were to continue indefinitely "during the pleasure of the President." 124 F.3d at 910. Here, the temporary use rights were "inextricably joined" to title, as the court of appeals said, App. 23, not to the pleasure of the President.

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[20]February 22, 1855, art. 1, 10 Stat. 1165. The language of relinquishment was that the Indians "do further fully and entirely relinquish and convey ... any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." 124 F.3d at 920.

[21]The tribe agreed "to cede, and do hereby cede, sell, and relinquish to the United States all their lands in the State of Wisconsin wherever situated." Article II; App. 199.

[22]July 9, 1837, 7 Stat. 536.

Moreover, the 1855 and 1837 Minnesota treaties covered distinct parcels of Minnesota lands. Id. at 919-20. Here, the 1848 treaty ceded ***all*** Wisconsin lands including those that were the subject of the 1831 treaty. Thus, in Mille Lacs the issue is whether the relinquishment relating to parcel A is sufficiently clear to extinguish use rights on parcel B. It is entirely different to argue, as the Menominee do here, that the relinquishment of all Wisconsin lands to remove to Minnesota did not extinguish temporary, title-dependent use rights thereon.

Last, Mille Lacs involves the President's authority regarding an Executive order that required the Indians' removal. The Eighth Circuit held that, without Indian consent, the President lacked authority to remove them and, therefore, lacked authority to revoke their use rights. 124 F.3d at 916-18. Here, there is no issue of a valid or invalid Executive order regarding removal. In fact, Congress ratified the 1836 and 1848 treaties that extinguished title and required the Menominee to remove. That made the treaty-imposed duty to remove the "supreme law of the land." Menominee Tribe v. United States, 391 U.S. 404, 411 n.12 (1968) (internal quotes omitted). Critically, because the duty to remove was by treaty, the Menominee **agreed** to remove. Neither Indian consent nor removal authority is an issue here.

Accordingly, any possible holding in Mille Lacs that the 1855 treaty did not extinguish reserved rights on a different parcel of land could not affect the issue in this case whether cession of title in a removal treaty terminated title-dependent rights on the same parcel. Likewise, a holding in Mille Lacs that the President had no authority to revoke use rights, absent Indian consent to remove, could not affect the issue whether title-dependent rights were terminated under congressionally-approved removal treaties in which the Indians agreed to cede title. These are entirely different cases.

These noted distinctions in the two cases make any differences in "approaches" an apples-oranges comparison. Moreover, the tribe's claim that the approaches are different is illusory. The Eighth Circuit focused first on the treaty language before concluding it could proceed to look for record evidence as to Indian understanding.[23] One can agree with Minnesota that the Eighth Circuit failed to give meaning to the plain language of the 1855 treaty, and that it failed to adequately distinguish this Court's holding on virtually the same language in Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985), but still agree that the court saw the importance of first reviewing the treaty language.

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[23]The court found that the 1855 treaty lacked explicit language of termination. Mille Lacs at 920 ("the 1855 Treaty is void of explicit language extinguishing the Band's usufructuary rights, nor does it mention the 1837 Treaty"). Regarding the 1854 treaty, the court observed the requirement that treaty-based rights require an explicit termination and relied only on the treaty language to conclude the evidence against extinguishment was "overwhelming." Mille Lacs at 919. It relied solely on the facts that the 1837 treaty contained an express reservation on ceded lands and that the 1854 treaty did so as well on the newly ceded lands. Id. Consequently, in applying the explicitness rule and in adhering strictly to the treaty language, Mille Lacs is the diametric opposite of petitioner's approach.

CONCLUSION

The petition should be denied.

Dated this 8th day of March, 1999.

Respectfully submitted,

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